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APPENDIX A

United States Court of Appeals
For the Sixth Circuit

National Labor Relations Board,
Petitioner,

vs.

Dean Foods Company, Inc.,
Respondent.

No. 19,496.

ORDER

Before: Edwards, Peck and McCree, Circuit Judges.

On petition to enforce and cross-petition to review and set aside an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition for enforcement of the order of the National Labor Relations Board be and the same is granted and the order is hereby enforced.

It is further ordered that Petitioner recover from Respondent the costs on appeal as itemized below.

Entered by order of the Court.

Carl W. Reuss
Clerk

Costs: To be recovered by Petitioner
printing $450.55

APPENDIX B

No. 19496

United States Court of Appeals
For the Sixth Circuit

National Labor Relations Board, Petitioner, v. Dean Foods Company, Inc., Respondent.	On Petition for Enforcement of an Order of the National Labor Relations Board.

Decided January 20, 1970.

Before: Edwards, Peck and McCree, Circuit Judges.

Per Curiam. In this action petitioner seeks enforcement of its order reported at 171 NLRB No. 60, pursuant to the provisions of the National Labor Relations Act, as amended, 29 U. S. C., §§ 151, et seq. There is also before the Court a cross-petition of the respondent asking that the order of the Board be reviewed and set aside.

The Board found that the respondent (hereinafter usually the "Company") violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the union here involved which had been certified pursuant to an election. The Company admits its refusal to bargain, challenging the certification on the basis of the invalidity of the election. The issue here presented is whether in overruling the Company's objections to the election the Board acted arbitrarily and capriciously and abused the discretion delegated to it by Congress in matters relating to representation election proceedings. *N. L. R. B. v. Waterman*

SS. Corp., 309 U. S. 206, 226 (1940); *N. L. R. B. v. S. H. Kress & Co.*, 194 F. 2d 444, 446 (6th Cir. 1952). Where a party seeks to overturn the results of such an election, the burden is on that party to show that the election was not fairly conducted (*N. L. R. B. v. Mattison Machine Works*, 365 U. S. 123, 124 (1961)), and thus more narrowly stated the issue here is whether the Company has sustained its burden of proving the invalidity of the election in question.

Some 48 days prior to the election the Company issued a memorandum to "All Supervisory Personnel" announcing a liberalization of vacation schedules for all non-union salaried employees, and specifically directing that the content of the memorandum remain confidential "since this change in our vacation plan could have an adverse effect on labor negotiations." Although this document apparently was available to the union at or soon after its promulgation, the union did not circulate it until two days before the election. On the next day it placed a copy in each employee's time card slot, but since only seven employees worked that day it is contended that the balance of the fifty employees did not see the document, upon which appeared at the top "THIS IS WHAT THE CO. THINKS OF US", until election day. Whatever issues may have existed concerning the manner in which the memorandum initially became available to the union become immaterial in view of the statement in the Company's exceptions to the Regional Director's Report on Objections to the effect that it was "not interested, nor . . . concerned with, who or what individual misappropriated the Company's confidential memorandum."

The Board has decreed that it will set aside representation elections on the basis of campaign propaganda only where that propaganda (1) misrepresents a material fact, involving a substantial departure from the truth; (2) is

timed so that the other party is prevented from making an effective reply; and (3) may reasonably be expected to have a significant impact on the election. *Hollywood Ceramics, Inc.*, 140 NLRB 221, 224 (1962). These criteria have been generally recognized by this Court in *N. L. R. B. v. Allen Mfg. Co.*, 364 F. 2d 814, 816 (6th Cir. 1966); and in *N. L. R. B. v. Louisville Chair Co.*, 385 F. 2d 922, 927 (6th Cir. 1967), *cert. denied*, 390 U. S. 1013 (1968); *see also, Anchor Mfg. Co. v. N. L. R. B.*, 300 F. 2d 301, 303 (5th Cir. 1962). In the last three cases, the courts were dealing with a situation in which the propaganda contained a false statement, a claimed misrepresentation based on an ambiguity, and what was assumed for the purpose of the opinion to be a misrepresentation, and in each it was held that the election was valid in spite of the distribution of the accused material.

The present case is novel in that the Company can scarcely claim that the document circulated contains any false statement, since it admits its authenticity as a company prepared memorandum. With reference to this document, the Company states, "Unfortunately, although inadvertently, the memorandum on its face connotes a surreptitious flavor to the document and its contents." If such a connotation in fact exists, it must be remembered that the language employed was chosen by the respondent itself.

On this record taken as a whole, the Board's finding that the circulation of the memorandum was not so timed that the Company was prevented from making an effective reply is sustained by substantial evidence.

The petition of the National Labor Relations Board for enforcement of its order is hereby granted, and the prayer of the cross-petition denied.

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APPENDIX C

171 NLRB No. 60 D-947
Memphis, Tenn.

United States of America
Before the National Labor Relations Board

Dean Foods Company, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO	Case No. 26-CA-2949

DECISION AND ORDER

On February 16, 1968, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that the Respondent Dean Foods Company, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified.

1. Delete from paragraph 2(b) of the Trial Examiner's Recommended Order that part thereof which reads "to be furnished" and substitute therefore "provided. . . ."

Dated, Washington, D. C. May 17, 1968.

.....
John H. Fanning
Member

.....
Howard Jenkins, Jr.
Member

.....
Sam Zagoria
Member

(Seal) National Labor Relations Board

APPENDIX D

TXD-111-68
Memphis, Tenn.

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Dean Foods Company, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO	Case No. 26-CA-2949

Roger B. Holmes, Esq., for the General Counsel.

Fowler, Brackhahn & Young, Memphis, Tenn., by Newell N. Fowler, Esq. and Richard A. Brackhahn, Esq., for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

The Representation Proceeding[1]

Charles W. Schneider, Trial Examiner: Upon petition for certification as collective-bargaining representative filed by Oil, Chemical and Atomic Workers International Union, AFL-CIO, herein called the Union, the Regional

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[1] Administrative or official notice is taken of the Representation proceeding, Case No. 26-RC-2925. See Section 9(d) of the National Labor Relations Act.

Director for Region 26 of the Board on May 31, 1967, approved a Stipulation for Certification Upon Consent Election executed by the Dean Foods Company, Inc., Memphis, Tennessee, herein called the Respondent, and by the Union. The appropriate bargaining unit was stipulated to be the unit set out hereinafter.

Pursuant to the stipulation, an election by secret ballot was conducted on July 20, 1967, under the direction and supervision of said Regional Director. There were approximately 50 eligible voters; 45 cast ballots, of which 23 were for and 17 against the Union. There were 5 challenged ballots. On July 25, 1967, the Respondent filed timely objections to conduct affecting the results of the election. On September 1, 1967, the Regional Director, after investigation, issued a Report on Objections in which he recommended that the objections be overruled in their entirety and that the Union be certified as the exclusive representative of the employees in the appropriate unit. Thereafter, on September 7, 1967, Respondent filed Exceptions to the Report on Objections, requesting review by the Board of the Regional Director's Report on Objections. On October 20, 1967, the Board issued its Decision and Certification of Representative, in which it adopted the Regional Director's findings and recommendations, saying that "The Employer's exceptions, in our opinion, raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's finding and recommendations or require a hearing." Accordingly, the Board certified the Union as the representative of the employees in the appropriate unit. On November 7, 1967, Respondent filed a Request to Review and Reconsider the Board's Decision and the record. On November 17, 1967, the Board denied Respondent's request as containing "nothing not previously considered by the Board."

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The Complaint Case

On December 1, 1967, the Union filed the unfair labor practice charge involved in the instant case, in which it alleged that since on or about October 27, 1967, and at all times since, the Respondent has refused to bargain collectively with the Union.

On December 15, 1967, the General Counsel, by the Regional Director of Region 26, issued a complaint and notice of hearing alleging that commencing on or about November 27, 1967, and at all times thereafter, Respondent has committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request. In due course the Respondent filed its answer to the complaint in which certain allegations of the complaint were admitted and others denied.

In its answer the Respondent admitted most of the material allegations of the complaint including the jurisdictional allegations, the appropriateness of the bargaining unit, the fact of the election, the certification, the Union's request to bargain and the Respondent's refusal. However, the answer averred that the certification was invalid and that Respondent was not afforded a hearing based upon his objections to the conduct affecting the results of the election. The Respondent admits refusing to bargain collectively with the Union but bases its refusal to recognize the Union upon "erroneous determinations" and deprivation of due process made by the . . . board" in its certification of the Union.

On January 5, 1968, counsel for General Counsel filed a Motion for Judgment on the Pleadings submitting that none of the details set forth in the Answer constitutes a valid defense to the allegations of the Complaint. It was

further submitted that the admissions contained in the Answer, considered together with the certification case, conclusively established the violations alleged in the complaint, and that no hearing is necessary.

On January 9, 1968, I issued an Order to Show Cause on the Motion for Judgment on the Pleadings in which the parties were directed to show cause on or before January 25, 1968, as to whether the Motion for Judgment on the Pleadings should be granted. On January 23, 1968, Respondent filed a Response to General Counsel's Motion for Judgment on the Pleadings and Order to Show Cause in which Respondent admitted most of the material allegations of General Counsel's Motion but contends that a valid defense exists to the allegations of the Complaint. Respondent asserts that its Answer together with the prior representation case constituted a valid defense. In addition, Respondent filed a Motion to Produce Evidence in which it is asserted that "certain documents and affidavits possessed and maintained by counsel for General Counsel be produced and made a part of the record." Respondent contends that a document known as Employer's Exhibit B has been omitted and not made a part of either this proceeding or the Report on Objections of the Regional Director. Respondent moves that "certain documents and investigatory affidavits possessed and maintained by counsel for the General Counsel" be produced and made a part of this proceeding or that alternatively, counsel for General Counsel's complaint be dismissed with prejudice. On January 30, 1968, counsel for General Counsel filed a Response to Motion of Respondent to Produce Evidence in which he asserts that the documents requested by Respondent were fully considered by the Regional Director and the matter considered by the Board and are therefore not matters to be reviewed by a Trial Examiner.

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Ruling on Motion for Summary Judgment on the Pleadings

The Respondent contends that the election and certification are invalid and that it is therefore under no legal obligation to meet with and bargain with the Union. However, it is clear that all material issues of fact and law in this regard have been decided by the Board.

The questions of the validity of the election, the merit of the Respondent's objections to it, and whether the Union should be certified as the collective bargaining representative were decided by the Board in the representation proceeding. It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances not to permit litigation before a Trial Examiner in a complaint case of issues which were or could have been litigated in a prior related representation proceeding.[2]

The Trial Examiner has no authority to review the Board's final disposition of the representation issues or to question its conclusions made on the existing record. The Respondent is free, in exceptions to this Decision, to request the Board to reconsider its conclusions, and in the event of an unfavorable final order by the Board may request review in an appropriate court of appeals. At this

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[2] **N. L. R. B. v. Macomb Pottery Company et al.**, 376 F. 2d 450 (7th Cir. 1967); **Howard Johnson Company**, 164 NLRB No. 121; **Metropolitan Life Insurance Company**, 163 NLRB No. 71; See **Pittsburgh Plate Glass Co. v. N. L. R. B.**, 313 U. S. 146, 162 (1941); Rules and Regulations, National Labor Relations Board, Series 8, as revised January 1, 1965, sec. 102.67(f).

In the case of **Baumritter Corporation et al. v. N. L. R. B.**, 386 F. 2d 117 (C. A. 1, 1967), the Court said:

> The Board is bound by its own prior determinations in the representation proceedings in the absence of newly discovered evidence. Hence, the Board was not required to grant a hearing and did not abuse its discretion in denying these requests.

stage of the proceedings, however, absent newly discovered or previously unavailable evidence or special circumstances, the Board's disposition of the representation matter is the law of the case and binding on the Trial Examiner. No such evidence or circumstances are asserted or offered by the Respondent here.

The refusal to bargain being conceded, there is no issue litigable before a Trial Examiner, and therefore no matter is the law of the case and binding on the Trial Board and the Trial Examiner have authority to enter summary judgment.

It is concluded that summary judgment on the pleadings is appropriate here.

There remains the Respondent's Motion to Produce Evidence. Counsel for General Counsel objects to the production of the evidence requested by Respondent in that they have previously been considered by the Board, and are therefore not subject to review by a Trial Examiner.

With respect to the request by Respondent for the production of "certain documents and investigatory affidavits possessed and maintained by General Counsel," it is to be noted that rulings by the Trial Examiner granting similar motions were reversed by the Board in **LTV Electrosystems, Inc.**, 166 NLRB No. 81 and in **Golden Age Beverage Company**, 167 NLRB No. 24. In view of this authority the Respondent's request for inclusion of the aforesaid material as a part of the record in this proceeding is denied. See also **Intertype Company v. Pennello**, 64 LRRM 2590 (U. S. D. C., W. D. Va., 1967). The General Counsel's Motion for Summary Judgment on the Pleadings is granted, and I hereby make the following further:

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Findings and Conclusions

I. The Business of the Respondent

Dean Foods Company, Inc., the Respondent, is a Michigan Corporation with its principal office and place of business located in Memphis, Tennessee, where it is engaged in the manufacture of dairy products. During the past 12-month period, which period is representative of all times material herein, Respondent purchased and received goods and products valued in excess of $50,000 directly from points located outside the State of Tennessee and during the same period, sold and shipped from its Memphis, Tennessee, plant, products valued in excess of $50,000 directly to points outside the State of Tennessee.

Respondent is an employer engaged in commerce within the meaning of Section 2(6) of the Act.

II. The Labor Organization Involved

The Union is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at Respondent's plant at 2040 Madison Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing operators,

and all helpers in said classifications, truck and maintenance mechanics, and plant clerical employees and working leadmen; excluding executive and administrative employees, supervisors and superintendents, office clerical employees and guards, and all other employees.

On July 20, 1967, a majority of Respondent's employees in the appropriate unit selected the Union as their collective bargaining representative in a secret ballot election conducted under the supervision of the Regional Director for Region 26 of the National Labor Relations Board.

On October 20, 1967, the National Labor Relations Board, after consideration of Respondent's objection to the above-described election, certified the Union as the exclusive collective bargaining agent of the employees in the said unit.

At all times since July 20, 1967, the Union, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all employees in the appropriate unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On or about November 21, 1967, the Union requested Respondent to bargain collectively with the Union as the exclusive collective bargaining representative of Respondent's employees in the appropriate unit.

On or about November 27, 1967, Respondent refused to bargain collectively with the Union as such representative.

By such action the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act and has interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

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The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions, and the entire record in the case, I recommend that the Board issue the following:

Order

A. For the purpose of determining the duration of the certification the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.[3]

B. Dean Foods Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive collective bargaining representative of the employees in the following appropriate bargaining unit:

> All production and maintenance employees at Respondent's plant at 2040 Memphis Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing operators, and all helpers in said classifications, truck and maintenance mechanics, and plant clerical employees and working leadmen; excluding executive and adminis-

[3] The purpose of this provision is to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law. See **Mar-Jac Poultry Co., Inc.**, 136 NLRB 785; **Commerce Co. d/b/a Lamar Hotel**, 140 NLRB 226, 229, 328 F. 2d 600 (C. A. 5), cert. den. 379 U. S. 817 (1964); **Burnett Construction Co.**, 149 NLRB 1419, 1421, 350 F. 2d 57 (C. A. 10, 1965).

trative employees, supervisors and superintendents, office clerical employees and guards, and all other employees.

(b) Interfering with the efforts of said Union to negotiate for or represent employees as an exclusive collective bargaining representative, or in any like or related manner interfering with employee efforts at self-organization.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Memphis, Tennessee, plant, copies of the notice attached hereto marked "Appendix."[4] Copies of said notice, on forms to be furnished by the Regional Director for Region 26, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices of employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[4] In the event this recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

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(c) Notify the Regional Director for Region 26, in writing, within 20 days from receipt of this recommended Order what steps it has taken to comply herewith.[5]

Dated at Washington, D. C., Feb. 16, 1968.

/s/ Charles W. Schneider
Charles W. Schneider
Trial Examiner

TXD-111-68

NOTICE TO ALL EMPLOYEES

Pursuant to
The Recommendations of a Trial Examiner of the
National Labor Relations Board
and in order to effectuate the policies of the
National Labor Relations Act

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive collective bargaining representative of all our employees in the following appropriate unit:

All production and maintenance employees at our plant at 2040 Madison Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing

[5] In the event these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 26, in writing, within 10 days from receipt of this Order what steps the Respondent has taken to comply herewith."

operators, and all helpers in said classifications, truck and maintenance mechanics and plant clerical employees and working leadmen; excluding executive and administrative employees, supervisors and superintendents, office clerical employees and guards, and all other employees.

WE WILL NOT interfere with the efforts of the Union to negotiate for or represent employees in the apropriate unit as collective bargaining representative, or in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights under the Act.

WE WILL bargain collectively with the Union as exclusive collective bargaining representative of the employees in the appropriate unit and if an understanding is reached we will sign a contract with the Union.

Dean Foods Company, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103 (Tel. No. 534-3161).

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APPENDIX E

Memphis, Tennessee

United States of America
Before the National Labor Relations Board

Dean Foods Company, Inc., Employer, and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Petitioner.	Case No. 26-RC-2925.

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted on July 20, 1967, under the direction and supervision of the Regional Director for Region 26 among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished a tally of ballots, which showed that of approximately 50 eligible voters, 45 cast ballots, of which 23 were for and 17 were against the Petitioner. There were 5 challenged ballots. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the Rules and Regulations of the National Labor Relations Board, the Regional Director conducted an investigation and, on September 1, 1967, issued and duly served upon the parties his Report on Objections in which he recommended that the objections

be overruled and that the Petitioner be certified as the collective-bargaining representative of the employees involved. Thereafter, the Employer filed timely exceptions to the Regional Director's Report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that all production and maintenance employees of Dean Foods Company, Inc., at its plant at 2040 Madison Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing operators and all helpers in said classifications, truck and maintenance mechanics, and plant clerical employees and working leadmen; excluding all other employees on company payroll at the above address, including executive and administrative employees, supervisors and superintendents, office clerical employees and guards, constitute a unit appropriate for the purposes of

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collective bargaining within the meaning of Section 9(b) of the Act.

5. The Board has considered the Employer's objections, the Regional Director's Report, and the Employer's exceptions thereto, and hereby adopts the Regional Director's findings and recommendations.[1]

Accordingly, as the tally shows the Petitioner has obtained a majority of the valid ballots cast, we shall certify it as the collective-bargaining representative of the employees in the appropriate unit.

Certification of Representative

It Is Hereby Certified that Oil, Chemical and Atomic Workers International Union, AFL-CIO, has been designated and selected by a majority of the employees, in the unit found appropriate herein, as their representative for the purposes of collective bargaining and that, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Dated, Washington, D. C., Oct. 20, 1967.

.....
John H. Fanning, Member

.....
Howard Jenkins, Jr., Member

.....
Sam Zagoria, Member

(Seal) National Labor Relations Board

[1] The Employer's exceptions, in our opinion, raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings and recommendations or require a hearing.

APPENDIX F

United States of America Before the
National Labor Relations Board
Twenty-Sixth Region

Dean Foods Company, Inc., Employer, and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Petitioner.	Case No. 26-RC-2925

REPORT ON OBJECTIONS

Based upon a petition filed May 8, 1967, and pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for the Twenty-sixth Region on May 31, 1967, an election by secret ballot was conducted on July 20, 1967, among certain employees[1] of the Employer at its Memphis, Tennessee, plant.

The results of the election as disclosed by the Tally of Ballots served upon the parties at the conclusion of the election are as follows:

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[1] All production and maintenance employees of Dean Foods Company, Inc., at its plant at 2040 Madison Avenue, Memphis, Tennessee, including cooler workers, pure-pak operators and maintenance men, pasteurizer operators, cheese makers, glass filler operators, receiving men, case room checkers, semi-trailer drivers, laboratory workers, butter printers, cheese packing operators and all helpers in said classifications, truck and maintenance mechanics, and plant clerical employees and working leadmen; excluding all other employees on company payroll at the above address, including executive and administrative employees, supervisors and superintendents, office clerical employees and guards.

Approximate number of eligible voters 50
Void ballots 0
Votes cast for Petitioner 23
Votes cast against participating labor organization 17
Valid votes counted 40
Challenged ballots 5
Valid votes counted plus challenged ballots....45
Challenges are not sufficient in number to affect the results of the election.
A majority of the valid votes counted plus challenged ballots has been cast for Petitioner.

On July 25, 1967, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was duly served upon the Petitioner. The Employer's objections are as follows:

1. The Union distributed literature on the day of the election that was stolen from the Company's files at a time so close to the holding of the election that the Company did not have an adequate opportunity to reply, and that additionally, such stolen Company memoranda had such an affect as to totally mislead and antagonize the eligible employees against the Company and its management personnel.

2. The Union adamantly insisted that it use, as its authorized Observer during the election period one Robert Tribble who had been challenged by the Company's representative as both ineligible to vote in the election and ineligible to represent the Union's interests as an Observer during the holding of the election.

3. The Union issued false and misleading statements during its pre-election meetings and confrontations with the employees and further raised the issue of racial discrimination to incite hostility and coerce

the employees in the exercise of their freedom of choice during the election period.

4. The Union made vigorous attempts throughout the pre-election period to coerce certain eligible employees to file and participate in bringing unmeritorious and false charges against the employer and his agents which also adversely affected the freedom of choice of the eligible employees during the election period.

5. The Union by other means threatened, coerced, and intimidated eligible employees so that a free and fair election could not, and was not, conducted on the 20th day of July 1967.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the objections to be made, during which all parties were afforded full opportunity to submit evidence bearing on the issues, and the undersigned, having duly considered the results thereof, reports as follows:

THE OBJECTIONS:

Objection 1:

As to this objection, it is the Employer's contention that the Petitioner, by some unknown means, came into possession of a confidential memorandum, a copy attached hereto as Exhibit A, addressed to "ALL SUPERVISORY PERSONNEL" relative to a change in the Employer's vacation plan.

The Employer further contends that it first learned that the employees were aware of the contents of this memorandum at approximately 9 a. m. on July 19, 1967, the day preceding the scheduled election, and it did not

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have an adequate opportunity to explain to its employees the contents of the memorandum.

The Employer asserts that if it had had an opportunity to explain the contents of the memorandum to its employees, it would have explained to them that this was a company-wide policy for supervisors, that the supervisors sometimes worked 60 hours a week and were deserving of the increase, and that the reference to labor negotiations in the memorandum referred to contract negotiations at other operations of the Employer and did not have anything to do with the election at its Memphis operation.

The plant superintendent testified that the subject memorandum was received by the Employer from its Chicago office in the latter part of May 1967, and sealed copies were distributed to its supervisory personnel. On or about June 1, 1967, it was discovered that a copy distributed to the laboratory supervisor was missing from his file basket where it had been placed pending his return from a leave of absence.

The Employer's plant superintendent, Wesley Hollis, testified that at approximately 9 a. m. on July 19, 1967, he observed that a copy of the subject memorandum was placed in each slot of one of the timecard racks located in the canteen. He also testified that a copy of the memorandum was placed on each of the four bulletin boards throughout the plant. He further testified that he thought the damage had already been done and he, therefore, did not remove the copies from the timecard rack. Hollis stated that there were only nine employees working on July 19, 1967, and the Employer did not think it would do much good to reply to the memorandum since it could not make any explanation after 2 p. m., July 19, 1967, because the election was scheduled to be held at 2 p. m. on the following day, and the normal work force would not be at the plant until the day of the election.

Hollis further testified that at approximately 9:30 p. m. on July 19, 1967, a rank and file employee volunteered the information to him that copies of the subject memorandum were distributed at a union meeting held on July 18, 1967, and that the employee was going to vote against the Union, but after he saw the memorandum, he changed his mind. The employee testified that he had made up his mind as to how he would vote long before he saw the memorandum and that the memorandum did not influence his vote.

The Employer's maintenance supervisor, Joe Howles, testified that at approximately 5 p. m., after the voting had concluded, during a conversation with a rank and file employee regarding the election and unions generally, the employee pulled a letter from his pocket and said, "Here was the main thing that got them." In response to Howles' question, the employee opened the letter, laid it on the desk and said, "Wimberly is the one who goofed. We got it, we photostated it and circulated it through the union meeting." The employee then pointed to the last paragraph of the memorandum where three or four lines were underlined and said, "This is what really hurt you."

The employee testified that the conversation in which he pulled the memorandum out of his pocket occurred on the day before the election. He states that he had a copy of the memorandum in his pocket and when he went into the work area he went up to Howles, pulled the letter out of his pocket and said something like, "Your letter got out." He further states that Howles laughed and said that it wasn't his letter; that his letter was at home in the drawer; and that Howles did not question him as to what occurred at the union meeting or whether the letter had any effect on the men. This employee further testified that he never told Howles that the memorandum was the thing that hurt the Employer.

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Petitioner's International Representative Hugh B. Owen testified that on either July 14 or 15, 1967, he received the vacation memorandum "anonymously" through the mail in a plain white envelope. At the union meeting of July 18, 1967, the memorandum was read aloud to those present and one employee mentioned that he had seen it before. Owen, when asked to read it again, made approximately seven photostatic copies, distributing them among the approximately 15 employees present. Owen testified that he gave no instructions to distribute these leaflets at the plant and that he does not know who, in fact, did distribute them at the plant. Owen further testified that the copies photostated by the Union were brown-tinted and did not have the phrase, "THIS IS WHAT THE CO. THINKS OF US," as did the black-tinted copies found in the plant. Owen's testimony as to what occurred at the union meeting was corroborated by various employees who attended the meeting.

In view of the foregoing, it is apparent that by 9 a. m. of the day before the election the Employer was aware of the publication and distribution of its memorandum and, if the testimony of the plant manager is credited, by 9:30 p. m. of the same day it was aware of the alleged impact of the memorandum upon one employee. Despite this intelligence, the Employer neglected to take any action to counteract any misunderstandings caused by its memorandum. Since the election was not scheduled to begin until 2 p. m. of the following day, and in view of the small size of the voting unit, the Employer's contention that it did not have time to take corrective action is rejected.

As the evidence submitted or adduced by the investigation does not support a finding that the Petitioner was in any way responsible for the misappropriation of company correspondence and as the Employer had ade-

quate opportunity to explain the memorandum, no merit is found to this objection.

Accordingly, it is recommended that Objection 1 be overruled.

Objection 2:

As to this objection, the Employer's position, through counsel, is as follows:

> Counsel submits that, one, because Tribble was a principal union adherent and that; two, he apparently filled himself with ostencibly (sic) confidential information of the company and that; three, he distributed this "information" distortedly to the employees and that; four, he was probably compensated for his efforts and that; five, he indeed had resigned from his employment status with the company and that; six, he served as the union's observer and representative during the holding of the election and that; seven, the company expressed its objection to him serving in that capacity during the conducting of such election, therefore Tribble's presence preceding and during said election so adversely affected the "laboratory conditions" that are required to prevail during the holding of said election, that it interfered with the freedom of choice during the election period of the remaining employees.

The Employer's first contention that Tribble was a principal union adherent is not a basis for disqualifying Tribble as the Union's observer.

In support of the second and third contentions, the plant superintendent testified that rank and file employees told him that Tribble had said the Company was making enough money to support two other plants and that connections around the plant gave him this information. Plant Superintendent Hollis further testified that he

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heard Tribble tell another employee that the employees of the Employer's Conway, Arkansas, plant received 35 cents Sunday premium pay, while the Employer's Memphis employees received only 10 cents Sunday premium pay. The collective bargaining agreement covering the Employer's Conway employees provides for a 35-cent premium for Sunday work.

It is found that the first remark attributed to Tribble, even if made, was innocuous and the second remark, if made, was correct and truthful.

The Employer admittedly had no evidence to submit in support of its contention 4, and none was adduced during the course of the investigation.

As to the Employer's contentions 5, 6 and 7, the investigation disclosed that on June 28, 1967, Tribble tendered his written resignation to be effective on July 29, 1967. Tribble acted as the Petitioner's observer during the election over the Employer's objections. As the Petitioner insisted upon using Tribble as its observer, the Board agent proceeded with the election notwithstanding the Employer's objections. As Tribble was employed on the payroll eligibility date and on the date of the election, he was still an employee of the Employer and an eligible voter.

In view of the foregoing, it is found that Tribble was qualified to serve as the Petitioner's observer and no merit is found to this objection.

Accordingly, it is recommended that Objection 2 be overruled.

Objection 3:

In support of this objection the Employer's plant superintendent, Hollis, testified that he was informed by an employee that the employee received several telephone

calls accusing the Employer of discriminating against its Negro employees. The employee testified that during the early part of June 1967 he had heard that Superintendent Hollis had gone around to the men in the bottling department telling them that if the Union came in the colored employees with more seniority would bump them and get the better jobs. Because of these rumors the employee asked Maintenance Supervisor Howles to arrange a meeting with Superintendent Hollis. The following day they met in the Maintenance Shop at which time the employee told Hollis that he had heard rumors that Hollis was trying to "play off" the colored against the white and was using him as a reference. He told Hollis that he did not know if Hollis actually spread the rumors but asked Hollis to leave his name out of it because he was not having anything to do with it. He also told Hollis that he didn't intend for people to start calling him again like they did the last time, referring to a previous election. The employee further testified that he did not tell Hollis that anyone had been calling him during the current campaign. The employee's testimony is corroborated by Supervisor Howles, who was present during the conversation. Hollis admitted that he told two employees that he understood that if the Union came in, the Company would follow seniority but he denied that he mentioned the racial issue or said the colored employees would get their jobs if the Company went by seniority.

Hollis further testified that another employee advised him that at a union meeting Union Representative Owen solicited signatures for a petition which accused the Employer of discriminating against its Negro employees. The employee denied making such a statement to Hollis and testified that no such petition was ever circulated. Owen testified that at no time did he ever solicit signatures for such a petition or ever raise the racial issue

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during the campaign. An examination of the Petitioner's campaign literature revealed it was devoid of any racial propaganda.

In view of the foregoing, it is found that the Petitioner did not issue false and misleading statements or raise the issue of racial discrimination, and no merit is found to this objection.

Accordingly, it is recommended that Objection 3 be overruled.

Objection 4:

In support of this objection Superintendent Hollis testified that an employee reported that Union Representative Owen had asked whether the employee had been offered a raise to stay on his job and if so, whether he would sign an affidavit to that effect. Owen allegedly told the employee that if charges were filed, the Union could become the bargaining representative without an election.

Owen testified that the employee mentioned hearing a rumor that he might be given a raise to induce him to remain on his old job. The employee asked Owen if the raise would be a violation of the law and Owen replied that there would be grounds for an unfair labor practice charge only if it could be proven that the employee was given the raise to influence his vote. Both Owen and the employee deny that Owen solicited an affidavit or the filing of a charge.

Assuming *arguendo,* that the incident occurred as alleged by the Employer, it cannot be reasonably found that it interfered with the voter's freedom of choice and is no basis for setting the election aside.

Accordingly, it is recommended that Objection 4 be overruled.

Objection 5:

In support of this objection the Employer's maintenance superintendent, Howles, testified that after the election an employee told him during the course of a conversation regarding the election and unions generally that the Company wasted their money on these lawyers because the Union knew what was coming out of the lawyer's office before the Company. The employee also made a remark about there being a leak in the lawyer's office. Howles could not recall whether or not the employee mentioned a specific fee paid the lawyer.

The employee to whom this remark is attributed testified that during the above-mentioned conversation with Howles he informed him it was a big waste of money spending $5,000 or $10,000 or more when the employees already had their minds made up. He further testified that he told Howles there was either a leak in the lawyer's office or the Union had dealt with them before because the Union knew pretty much what type of things lawyers would do, indicating it was his own observation.

Petitioner's Representative Owen testified that he did not tell the employee that the Employer was paying a lawyer $5,000 to keep the Union out but probably mentioned that the Company had lawyers to advise and help keep the Union out.

In view of the foregoing and assuming *arguendo* that the remark attributed to Petitioner's Representative Owen was made, such statements, even if false, are not of such a nature to warrant setting the election aside,[2] and no merit is found to this allegation.

Also in support of this objection Superintendent Hollis testified that an employee told him that Petitioner's Rep-

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[2] **Hill Brothers**, 114 NLRB 164.

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resentative Owen at a union meeting told the employees that if the Union did not win the election it would boycott the Employer's product.

The employee denied that Owen had made such a statement, denied reporting such a statement to Hollis, and Owen denied ever mentioning a boycott. Other employee witnesses were interviewed and in their testimony specifically denied hearing any union representative at any time making any comments about boycotting the Employer or its products and no merit is found to this portion of this objection.

Accordingly, it is recommended that Objection 5 be overruled.

Conclusions and Recommendations

Having recommended that the Employer's objections be overruled in their entirety, and as the Tally of Ballots reveals the Petitioner received a majority of the valid votes cast, it is further recommended that the Board certify the Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of the employees employed in the unit herein involved within the meaning of Section 9(a) of the Act.

Dated at Memphis, Tennessee, this 1st day of September 1967.

/s/ John J. A. Reynolds, Jr.
John J. A. Reynolds, Jr., Director
Twenty-Sixth Region
National Labor Relations Board
746 Federal Office Building
167 North Main Street
Memphis, Tennessee 38103

EXHIBIT A

THIS IS WHAT THE CO. THINKS OF US.

May 22, 1967

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ALL SUPERVISORY PERSONNEL

Effective June 1, 1967 the following vacation program will be in effect for all non-union salaried employees of the Dean Foods Company:

2 weeks after 1 year of service
3 weeks after 5 years of service
4 weeks after 10 years of service

The addition of 4 weeks vacation after 10 years is a significant improvement in our program. The third and fourth weeks should be scheduled with the approval of the employee's immediate supervisor. Do not post this notice, and please inform the employees under your supervision personally since this change in our vacation plan could have an adverse effect on labor negotiations. If you have any questions regarding this contact me.

John Linton

JL:bw

In the

Supreme Court of the United States

October Term, 1970

No. .....

Dean Foods Company, Inc.,
Petitioner,
vs.
National Labor Relations Board,
Respondent.
} No. .....

Certificate and Proof of Service

Pursuant to Supreme Court Rules, Rule 33 (3), I, Newell N. Fowler, one of the Attorneys for Dean Foods Company, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of April, 1970, have caused to be served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States and on several parties thereto as follows:

1. The United States by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530.

2. On the National Labor Relations Board by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to Arnold Ordman, Esquire,

General Counsel, at the Office of the Board, 17[illegible] Pennsylvania Avenue, N. W., Washington, D. [illegible] 20570.

Signed: Newell N. Fowler
Newell N. Fowler
Fowler, Brackhahn, Young & Per[illegible]
Memphis Bank Building
44 North Second Street
Memphis, Tennessee 38103
Attorneys for Dean Foo[illegible]
Company, Inc.

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